CORRESPONDENCE/MEMORANDUM

State of Wisconsin

WISCONSIN DEPT. OF NATURAL RESOURCES

DATE: November 12, 2004

TO: NR 115 Advisory Committee Members

FROM: Carmen Wagner, WT/2

SUBJECT: Comments and Responses from Third Draft of Changes to Ch. NR 115, Wis. Admin. Code

The summary provided below includes comments received from advisory committee members at the October advisory committee meeting, as well written comments provided by advisory committee members after the meeting. The comments have been separated out by sections in the proposed rule, and have been condensed to avoid repetition. A response to the comments is provided to explain how the third draft was changed to produce the fourth draft as a result of the comments or why a change was not made. This document does not capture or address all the changes between the third and fourth drafts, because in some instances a change between drafts had cascading effects that required additional changes.

Sections

NR 115.01 Purpose

C1: For sub. (4), while this is an improvement over the prior draft, this provision is still objectionable because it suggests that even though a county adopts a shoreland zoning ordinance that meets the minimum state standards the county may not be in compliance with Wis. Stat. Sec. 281.31 (1) and (6) unless it adopts more restrictive standards. We feel this is an inaccurate assessment of state law.

R: The subsection allows counties to adopt more protective regulations in order to meet the objective of ss. 281.31 (1) and (6), and to adequately protect local resources. The language specifically states that counties "may", and does not state "shall". The decision to adopt more protective regulations is left to the counties.

NR 115.02 Applicability

NR 115.03 Definitions

C2: The definition for campground should simply refer to the existing definition in State Administrative Code HFS 178

R: Definition modified to reference a permit through ch. HFS 178, Wis. Admin. Code.

C3: The definition of mitigation should be kept in for the sake of clarifying what mitigation is for the counties that have already put mitigation in their codes as a result of waterbody classification.

R: The previous definition of "mitigation" added, as suggested.

C4: In the definition of "ordinary maintenance and repair" the first sentence starts with "means any work done on a nonconforming structure". This should say "any structure" or "nonconforming or conforming structure".

R: Language modified as suggested.

C5: In the definition of "residential use" the phrase "or any site in a campground that is occupied by the same camping unit or other structure for more than 120 days in any 12-month period" should be removed from the definition. No county will be able to enforce this time period for compliance.

R: This will be applicable when campgrounds are expanding or new campgrounds are proposed. Existing campgrounds would be "grandfathered" until expansion. To enforce, counties could require as part of the permitting process, identification of sites where structures are proposed to remain year-round as residential use sites to ensure that the density standards are met.

C6: The definition of structure should allow counties more flexibility in determining what is or is not a structure. This is of particular concern in the shoreland setback area when dealing with smaller objects. Examples would be swingsets, well pump house covers, etc.

R: The definition of structure excludes small objects easily moved by hand. Well pump house covers were added as an example of an utility-related structure that counties may exempt from the shoreland setback.

C7: The definition of variance should not include any reference to "use". If a use were changed it would require a rezoning to a different "use district".

R: In two recent Wisconsin Supreme Court decisions, a distinction was made between use variance and area variances. The definition reflects both types of variances.

C8: For 'visually inconspicuous', reword so that the "principal structure shall not be readily seen from the water."
R: Language was struck.

NR 115.05 Shoreland zoning districts

NR 115.07 Shoreland-wetland zoning

NR 115.09 Land division review

(2) General

C9: We do not believe that the department has the statutory authority to require counties to adopt land division regulations in shoreland areas.
R: Section 281.31 (1), Wis. Stats., charges that the "purposes of the regulations shall be to … control building sites, placement of structure and land uses" and s. 281.31 (6) requires that "such standards and criteria shall give particular attention to … shoreland layout for residential and commercial development." To achieve these statutory objectives, ch. NR 115 has historically and continues to require land division review in the shoreland zone to ensure that lots that are created to be buildable are in fact buildable.

C10: Why do counties need to review land divisions that are the result of combining lots?
R: To ensure minimum lot size standards or density requirements are satisfied, combination of lots should be reviewed.

(3) Navigable bodies of water within lots

C11: Agree with October proposal, however you may want to consider including only rivers and streams to avoid the legal issue with state ownership of lakebeds and the possibility of creating two lots where only one was intended.
R: Language was modified as suggested.

C12: This makes no sense. The lot is already divided purely by the fact that it doesn't have contiguous ownership. Lakes need to be treated different than rivers and streams because of the lakebed ownership issue.
R: Please refer to the response for Comment 11.

C13: This provision prevents the sale of unbuildable lots. Restricting the sale of private property, whether buildable or unbuildable, is not a legitimate function of the department. This provision should be deleted.
R: Language was modified and reference to buildable locations was removed.

C14: The paragraph on "Navigable bodies of waters within lots" should be eliminated. It simply causes more confusion and other sections of the code already address this issue (i.e., setbacks). If you do not eliminate this section it needs to be very clear on what it means. It may help to require that in these situations the unbuildable portion of the lot is an outlot and cannot be built on.
R: Language was modified to clarify.

C15: Does this prohibit the sale of an unbuildable lot because it would not have an area for a "resonably-size structure".
R: Please refer to the response for Comment 13.

(4) Substandard lots in common ownership
C16: Agree with October proposal
R: Language was modified to give counties the authority to regulate substandard lots in common ownership, but counties shall determine the standards based on their particular situation.

C17: I am adamantly opposed to this provision and feel it does not belong in this rule and is far to reaching over a property owner's value and rights.
R: Please refer to the response for Comment 16.

C18: By expanding the scope of this provision from undeveloped substandard lots to all undeveloped lots, this draft is far worse and will have a significantly greater financial impact upon property owners in this state. By requiring these lots to be merged into larger lots that meet the newly proposed lot-size requirements, the cumulative value of these lots will decline. Many property owners own a substandard developed lot with an adjacent substandard undeveloped lot. Under this proposal, the property owner would be prohibited from selling or transferring either lot (developed or undeveloped) unless the lots were merged to create a lot that conforms to the new minimum lot-size requirements. To protect the investment-backed expectations of property owners, all pre-existing lots should be grandfathered. At a minimum, this section should be modified to make it clear that 2 or more substandard, undeveloped lots that are adjacent to one another and in common ownership should be merged.
R: Please refer to the response for Comment 16.

C19: This paragraph should also be eliminated. No method exists which allows counties to review the sale of substandard lots in common ownership before they are sold to another person. Without this ability to review the sale of substandard lots no enforcement mechanism exists until an "after the fact" application is made for a zoning permit on the substandard lot.
R: Please refer to the response for Comment 16.

C20: This makes sense in light of the purposes of shoreland zoning, but it is difficult to enforce because zoning departments are not notified when property is put up for sale.
R: Please refer to the response for Comment 16.

C21: Could it be changed to apply just undeveloped lots?
R: Please refer to the response for Comment 16.

C22: This should be a local decision.
R: Please refer to the response for Comment 16.

NR 115.11 Lot size and development density

(2) General
C23: This measurement paragraph is confusing.
R: Language was modified to clarify.

C24: The inland lot measurement makes it very difficult to make a cul-de-sac development if all the lots are measured at the roadway.
R: Language was modified to allow counties to set a different point of measurement for inland lots.

C25: To be consistent with the measurement standards for other lots, the width of a riparian lot should be measured only in one place -- at the OHWM. Requiring lots to be measured at both the OHWM and the setback line will make it difficult to subdivide property that is subject to unique topographical limitations. Because counties have employed a myriad of techniques for measuring lot width over the years, this provision should apply only to newly created lots (those created after the effective date of the NR 115 re-write) to avoid creating more nonconforming lots.
R: This issue has been a topic of much debate by Advisory Committee members and the proposed language is a compromise of the alternatives suggested.

C26: The point on a lot or parcel of an inland lot at which the lot width is measured should have more options for counties. Measuring the lot width at the roadway setback may not be practical for lots that are narrow at the road and expand in width and area farther away from the road where a structure is likely to be built. Give counties the option to use lot or parcel area, average lot width, etc. to make this determination.
R: Please refer to the response for Comment 24.

(3) Residential uses

C27: The heading on this paragraph is "residential uses". This is inaccurate because this only deals with "residential lot sizes". Any reference to construction or new residences or structures should also be taken out because this is about the creation of new lots or parcels.
R: Sections, as a whole, deals with lot sizes, so it was not repeated in the title of the subsection. Language referencing construction was removed.

C28: Agree with October proposal.
R: Proposal retained language for single-family and duplexes, but modifications were made multi-family and planned unit developments.

C29: I feel these provisions are far too restrictive. The provisions in this area need to be relaxed to provide for a community's economic opportunity to grow or be sustained. A county or town can always choose to be more restrictive.
R: Please refer to the response for Comment 28.

C30: Are we treating a condominium any different than any other multi-family?
R: No – language clarifies that condominiums are to be treated the same as any other type of development, regardless of ownership.

C31: By prohibiting development on existing lots that do not meet the new lot dimension standards, this provision will significantly reduce the value of 1000s of existing lots and result in economic hardship for the property owners.
R: Development is not prohibited on existing lots that do not meet lot dimension standards. In addition, the lot dimension standards for single-family residences and duplexes is unchanged. If a lot does not meet the minimum standards, it can still be built on as long as the setback, buffer and other provisions can be satisfied.

C32: The specific standards for various densities contained within this code is unnecessary and makes NR 115 appear to be a state shoreland zoning ordinance, rather than minimum standards. At the last meeting, the department maintained that this provisions was intended to insure that counties develop standards that differentiate between single-family and multi-family development. Accordingly, the department should simply direct the counties to adopt their own standards which differentiate between single-family and multi-family development.

R: Language was modified to simply multi-family development density standards and counties may adopt different standards if they are affective as the minimum standards in achieving the purposes of the program.

C33: Should be minimum standards, but counties should be able to other things if they want. Provide options to accommodate northern counties and southern counties. For instance if a county increases setback, maybe lot size could be decreased for multi-family development.

R: Please refer to the response for Comment 32.

C34: Need to balance single-family and multi-family development so it is equitable for all.

R: Proposal aims to be equitable and achieve statutory objectives of program.

C35: Proposal should reflect what counties have in place for multi-family development.

R: Please refer to the response for Comment 32.

C36: Standards should not be lowest common denominator when looking at existing county regulations. Need to maintain environmental standards.

R: Please refer to the response for Comment 32.

C37: Initial goal was to simplify and clarify, but right now there is too much detail. Allow counties to be innovative to reduce variance workload.

R: Please refer to the response for Comment 32.

C38: Problem is not that multi-family standards are proposed, but a reasonable minimum standard is need that also offers counties options to do something else.

R: Please refer to the response for Comment 32.

C39: Maybe multi-family standards are not needed.

R: Please refer to the response for Comment 32.

(4) Campgrounds

C40: The densities proposed for campsites are too large. HFS 178 has density standards that can be referred to. Any language in NR 115 about campgrounds should only deal with setbacks to the Ordinary Highwater Mark (OHWM) and buffers.

R: The density requirement for "non-permanent" campsite was changed to reference existing standards in ch. HFS 178, Wis. Admin. Code.

(5) Keyhole Development

C41: Agree with October proposal

R: Proposal retains lot size requirements, but other requirements were struck.

C42: If the goal is to eliminate keyhole access this will do the trick. The value of the lake lot will far outweigh the increased value of the off water lots it services.

R: The intent is not to eliminate keyhole access, but to establish minimum standards for lots used in such a manner.

C43: The state should not be regulating keyhole developments. It seems illogical for the state to prohibit, for example, three people living across the street from owning a waterfront lot, but allow three people living out of state to own the same waterfront lot. The state should not attempt to regulate who may own waterfront property or the form of ownership through which people can own waterfront property. If a county wants to regulate the manner in which a waterfront lot is owned, then the county may choose to do so.

R: Ownership language was struck.

C44: Eliminate location, structures and ownership requirements for keyhole lots. What is the goal?

R: Language was struck.

C45: Don't need keyhole standards – they have less impact that boat landings. Maybe have the same standards as a boat landing.

R: Language was modified to establish just minimum standards.

C46: The potential impacts from this type of use compared to a boat landing is different. The pressure for this type of use is increasing as more and more inland lot are getting developed.

R: Please refer to the response for Comment 45.

C47: Requires counties to restrict keyhole lots, but don't say how. It's county problem and let them deal with it.

R: Please refer to the response for Comment 45.

C48: Like having the conditional use process, but don't need location, structure or ownership standards.

R: Please refer to the response for Comment 44.

C49: Need to recognize interplay with different standards. A limitation and a standard is needed, but make more general.

R: Please refer to the response for Comment 45

(6) Other uses

C50: Any existing lot or record that can meet the setbacks and other standards of NR 115 should be granted a permit. The granting of a permit should not be conditioned on the size of the lot.

R: Language modified.

(7) Planned unit development

C51: Instead of titling this "planned unit developments", suggest the title "alternative developments". This section should have general standards only. The requirement for permanent conservation easements should not be included as a part of an alternative development. No setbacks or buffers to wetlands should be in this section or any other section of NR 115.

R: Language modified as suggested.

C52: I believe there are major problems with the Planned Unit Development section as written in the October proposal. I do not agree that a minimum square footage lot size will protect the waters since long, narrow lots would meet the requirement. We need a minimum width in the shoreland

zone and I recommend we reinstate the width requirements listed in the August proposal, at least for the first two "tiers" of housing; otherwise we will see all the building occurring as close to a body of water as possible. Since nearly all the shoreland slopes downward to the direction of the body of water, the absorption capability of common areas which are located beyond the building sites will not compensate for the erosion, impervious surface runoff, loss of habitat, etc. that will occur with concentrated density close to the water.

R: Language modified to allow counties greater flexibility in determining standards for these types of developments.

C53: Will open space be required to be within 1,000 feet of a lake or 300 feet of a stream, since this is the only area we can regulate? Many projects will go beyond these boundaries.

R: Please refer to the response for Comment 52.

C54: I think PUDs are great to encourage responsible development, but feel it should be the individual counties' responsibility to set standards for what qualifies. I don't think this a one size fits all provision.

R: Please refer to the response for Comment 52.

C55: Generally speaking, the inclusion of PUD standards in this code unnecessarily complicates NR 115. Also, the regulation of PUDs is a local zoning function and should not be included in the state shoreland zoning code. Specifically, this provision should not prohibit PUDs on less than 5 acres, require a minimum increase for BOTH setbacks AND buffer areas, and include approval criteria unrelated to shoreland development (avoid new construction on hilltops and ridges, preservation of valuable historic, archaeological or cultural sites, protection of rural character, and provision of reasonable contiguous conservation areas . . .). Lastly, the "incentives" are insufficient to truly encourage PUDs and take away the necessary flexibility for counties to make PUDs a success in the marketplace.

R: Please refer to the response for Comment 52.

C56: Proposed standards may take away flexibility that is needed for PUDs. May be too prescriptive. Maybe counties can demonstrate how ordinance meets standards in s. 281.31 (1) and (6), Stats. to provide more flexibility to counties.

R: Please refer to the response for Comment 52.

C57: Are distinctions between sewered and unsewered needed?

R: Please refer to the response for Comment 52.

(8) Substandard lots

C58: Can substandard lots qualify for setback reduction? If so, this should be stated.

R: In setback reduction section, it states that lots must be a minimum of 7,000 square feet.

NR 115.13 Shoreland setbacks

(3) Permit required

C59: Counties should not have to require a permit for the demolition of a structure. If after the structure is removed and filling, grading and excavating is done then a county permit or erosion control requirement could be required.

R: Language struck.

(4) Structures exempted by other laws

C60: It should be made clear in this paragraph that a county permit is still required even though the structure is exempt from shoreland setback standards.

R: In sub. (3), that point is made.

C61: Any "damaged or destroyed nonconforming structures" regulations should be in the nonconforming section of NR 115.

R: Language modified as suggested.

(4) Structures that counties may exempt

C62: More details than needed for this section.

R: Language was modified to simplify.

(b) Walkways, stairways and lifts

C63: Why is the code trying to regulate the number of stairways that a property owner can have? Has this really been a problem in terms of protecting the public trust? Isn't this form of regulation better suited for county zoning ordinances, rather than state minimum shoreland zoning standards? Will this new standard result in a greater number of nonconforming properties?

R: Number of stairways is limited to prevent damage to primary buffer and function it is to perform.

C64: It is almost impossible to make a walkway, stairway or lift that goes to the OHWM visually inconspicuous. Since the walkway goes all the way to the waters edge no land remains to screen the walkway with vegetation. Even if you choose a color for the walkway that blends into the surrounding landscape it will still be readily visible from the water.

R: Language struck.

(c) Signs

C65: This provision only allows informational signs ("for sale" signs, etc.) within the shoreland setback only <u>if</u> the county has adopted standards for signs and associated lighting in order to preserve wildlife habitat and natural beauty. How many counties currently regulate signs and sign lighting? For those counties that do not have such regulations, this provision will prohibit property owners from placing "for sale" signs, political signs and other informational signs within the shoreland setback of their property. This will obviously infuriate many property owners.

R: Many counties already have signs provisions. When other counties amend their ordinances, they will need to determine at the county level how they want to handle sign regulations.

(d) Water quality improvement structures

C65: The requirement to establish or preserve vegetation within 50 feet of the OHWM for water quality improvement structures should be reduced to 35 feet which is consistent with the current regulation and the "Gard Bill".

R: The "Gard Bill" requires the buffer be half the setback distance or 37.5 feet, the language was modified however to be 35 feet.

(h) Parking areas at access sites

C66: Does this include parking lots at commercial properties? Should it, if not?

R: At this point, it does not include commercial properties.

(j) Utilities

C67: This should state utility transmission and distribution lines. Not just transmission lines.

R: Language modified as suggested.

(6) Setback reduction process

C68: Agree with October proposal.

R: Language retained from October proposal, but a standard for setback averaging was added. The same requirements apply regardless of which setback reduction process is used – the formula or averaging.

C69: I feel this section should allow counties to incorporate a reduced setback or shoreline averaging setback if the county desires. I also feel if setback averaging is allowed, there should be a cap system implemented similar to the non-conforming expansion proposal.

R: Please refer to the response for Comment 68.

C70: As stated in our previous comments, we oppose the elimination of the setback averaging standard.

R: Please refer to the response for Comment 68.

C71: The 1500 sq. ft. maximum footprint for all structures is unreasonably low. Because garages are included in the calculation, the maximum footprint size should be 2000 sq. ft..

R: The 1500 square foot cap only applies to structures built or expanding within the shoreland setback area – closer than 75 feet. According to the National Association of Homebuilders, the average single family house built in 2004 was 2,272 square feet with a two-car garage. The proposed footprint could accommodate a 500 square foot garage, 1,000 square feet of living space on the first floor, and 1,500 square feet of living space on the second floor, if the garage is attached, totaling 2,500 square feet of living space, exceeding the size of the average single-family home built in 2004. A cap of 1,500 square feet seems adequate.

C72: The minimum setback allowed in the setback reduction process should be 35 feet and not 50 feet. If 50 feet is used it will conflict with some existing county ordinances that have used 35 or 40 feet as a minimum setback in their waterbody classification ordinances.

R: Language modified as suggested.

C73: In general this section is too prescriptive and not performance based.

R: Examples of performance-based standards have not been provided.

C74: Option idea is good, but language is too vague. How would a county prove?

R: Language modified to clarify, and additional guidance would be provided by Department if changes are approved.

NR 115.15 Shoreland vegetation

(3) Shoreland buffers

(a) Primary shoreland buffer

C75: I have concerns about the variable buffer depth being allowed at 35' minimum (even with the requirements that 50% be within 75' buffer), particularly when combined with an allowance of a 60' maximum access corridor based on 200' lot width. I believe we are compromising our goals, particularly when we know that we are degrading our water quality under the current NR 115 standards. It seems to me that the buffer should be concentrated to the front of the impervious surfaces in order to minimize runoff. I would agree to the variable buffer provided that the county

has authority to approve/disapprove each individual plan based on consideration of the effect on water quality, wildlife habitat and visual consideration, in that order.

R: Primary shoreland buffer depth was reduced to 35%; however, standards for vegetation management and access corridors was improved, and a standard was introduced for impervious surfaces to balance the decrease in the primary shoreland buffer depth.

C76: I like your idea of allowing flexibility in the location of a buffer. However, I feel the proposed square footage of a primary buffer of 50' from the OHWM is more than it needs to be.

R: Please refer to the response for Comment 75.

C77: As stated previously, we oppose increasing the primary buffer from 35 feet to 50 feet.

R: Please refer to the response for Comment 75.

C78: The primary shoreland buffer should be 35 feet as is currently exists. To increase the buffer depth will potentially create more nonconforming properties. The variable depth option is not a good option.

R: Please refer to the response for Comment 75.

C79: Variable buffer formula should be modified to be based on total area of shoreland setback area rather than total lot area.

R: Please refer to the response for Comment 75.

(4) Access corridor

C80: I am opposed to treating different lot sizes unequally. When you are using a percentage of frontage calculation, it should be proportionate to all property owners under the current proposal. A lot with 200' of frontage can have a 60' corridor and a lot with 300' of frontage can have a 60' corridor.

R: Proposal uses a sliding scale to be as accommodating to every situation.

C81: I proposed rewording subsection as follows:

(4) ACCESS CORRIDOR. (a) The removal of trees and shrubs in corridors extending through the primary buffer to the water may be allowed in order to provide safe and convenient pedestrian access to the waterfront. No more vegetation than necessary to provide such access should be removed, and the total width of the corridors may not exceed:

1. For lots or parcels of land with 200 feet or less of width at the ordinary high-water mark, the total width of the corridor or corridors shall not exceed 30% of the lot or parcel's width at the ordinary high-water mark, up to a maximum of 50 feet.

2. For lots or parcels of land with more than 200 feet of width at the ordinary high-water mark, the total width of the corridor or corridors shall not exceed 50 feet or 20% of the lot or parcel's width at the ordinary high-water mark, up to a maximum of 100 feet.

R: Language was modified similar to suggestion.

C82: There should be a requirement that a plan for the access corridor be done and submitted for approval before land is cleared in the primary buffer. I would suggest:

(4)(c) . . .A plan for the access corridor(s) that shows pathways, stairways, and the removal of trees and shrubs must be submitted to the County for approval before land is disturbed in the primary buffer.

R: Language was modified similar to suggestion.

(13) Protective Areas

C83: Agree with October proposal.

R: Language was simiplified and changed to a wetland setback, consistent with most situations under ch. NR 151, Wis. Admin. Code.

C84: This should be eliminated. This will create many nonconforming structures and make administration very difficult. Setback to wetlands has not been required previously in NR 115 and they should not be included now. This has been discussed at early Advisory Committee meetings and it appeared the DNR was not going to propose any requirement for wetland setbacks. This has not been in previous 2 drafts of NR 115 either.

R: Please refer to the response for Comment 83.

NR 115.17 Land disturbing activities

(3) Permit required

C85: May want to consider language that a permit is needed if it posed an erosion threat or runoff problem.

R: Unless a permit is required, it unclear how the threat would be addressed.

C86: "Permit Required" should be changed to "Erosion Control Plan Required". This would allow a county to make a determination for a grading project on erosion control. If no erosion control is needed then no permit is needed. If erosion control is needed then the property owner could be required to do so. Do not make this a permit requirement for each grading project.

R: It is unclear how a plan requirements would be enforced if there is not a permit, or how an insufficient plan would be improved.

(4) Permit exemption

C87: Change any reference to "county permit requirement" to "erosion control plan required". Also, could make reference to NR 151 and Department of Commerce permit requirements.

R: Please refer to the response for Comment 86.

NR 115.19 Nonconforming uses and structures

(1) Purpose

C88: The department does not have the authority to require counties to regulate nonconforming structures. Although we maintain that counties do not have the statutory authority to regulate nonconforming structures, the attorneys for the department have maintained that such authority is derived from the general zoning enabling authority for counties. Assuming that this argument is correct (which we believe to be erroneous), the general zoning enabling authority for counties "permits" counties to regulate the placement and expansion of structures, but does not require it. By requiring counties to regulate nonconforming structures, this provision would improperly eliminate the discretionary authority given by the legislature to counties. Furthermore, this

purpose statement is one-sided and fails to recognize the importance of private property rights, and the positive impact that development sometimes has on water quality.

R: Purpose statement reflects statutory objectives of program.

C89: Eliminate the prescriptive standards in this section and simply require counties to meet goals and objectives of ss. 281.31. This section is very complex and does not allow counties flexibility.

R: Language was modified to simiplify.

(3) Nonconforming accessory structures

C90: Agree with October proposal.

R: Language was largely retained, with reference to mitigation added.

C91: We do not believe that the Department has the authority to require counties to regulate all nonconforming accessory structures in the shoreland setback area, or to prohibit structural alterations in excess of 25 %.

R: The existing standards do not distinguish between nonconforming accessory or principal structures. The proposed standards would distinguish between them to allow more flexibility to counties and property owners.

C92: 25% of what? The total area of the structure?

R: Language modified to clarify.

(4) Nonconforming principal structures

C93: Agree with October proposal, except that is there is already an irregular sideways extension of the principal structure (an "L-shaped" house), an expansion may extend out to the boundary of that extension, provided it meets the sidelot setback.

R: Language modified and if the proposed expansion is landward of some portion of the existing structure, it would be allowed.

C94: I believe we should draw the line at 50 feet from the ordinary high-water mark for expansions – if your structure is beyond that, you can expand.

R: The line was decreased to 35 feet, consistent with the primary shoreland buffer depth.

C95: I propose for expansion of nonconforming structures, we use the following guidelines:

- Structures located entirely within 50 feet of the OHWM cannot expand.
- Structures are closer than 50 feet from the OHWM, but extend beyond 50 feet, can expand based on how much of the structure extend beyond 50 feet. (i.e. a 1,000 s.f. structure has 250 s.f. beyond 50, can expand 25% or 125 s.f. of 500 feet. (1500 s.f. cap, 1000 s.f. in existing structure, 25% of 500 s.f. = 125 s.f.)
- Structures setback back at least 50 can expand to higher cap with the same formula.
- Expansion beyond 75' can occur sideways.

R: Language was modified to allow expansion between 35 and 50 feet, and if a county wants to adopt a formula similar to proposal, it could under sub. (7).

C96: As stated in our previous comments, we do not believe that the Department has the authority to require counties to regulate all nonconforming accessory structures in the shoreland setback area, or to prohibit structural alterations unless certain aesthetic criteria are met. At a minimum, NR 115 should allow expansion of nonconforming structures in a manner that is consistent with the

applicable regulations where the expansion is proposed. Such a provision would be consistent with the comments received at the public listening sessions held around the state.

R: Department disagrees with proposed interpretation of authority granted by statutes and requirements of common law. The proposal for nonconforming structures is based on statutory objectives of program, recommendations of advisory committee members, and comments received from the public at listening sessions.

C97: Visually inconspicuous standard is stupid, and too high of a standard to hold projects to, and may be disproportionate to costs.

R: Language struck.

C98: Where does the authority to regulate aesthetics come from?

R: Section 281.31 (1), Wis. Stats, states that the program shall "reserve…natural beauty."

(5) Optional Standards

C99: Agree with October proposal.

R: Language retained.

NR 115.21 Performance standards for shoreland construction, expansion and replacement of principal structures

(1) Purpose

C100: Mitigation should be encouraged to counties but the counties should set their own mitigation standards and how to administer it, but the department can offer models or guidance if needed.

R: Language modified to allow counties more flexibility in adoption and administration of mitigation system.

C101: This purpose statement is one-sided and fails to recognize the importance of private property rights, and the positive impact that development sometimes has on water quality.

R: Please refer to the response for Comment 88.

C102: In general the performance standards are too restrictive. More flexibility should be allowed for the counties.

R: Please refer to the response for Comment 100.

(2) General

C103: This provision prohibits all improvements to any structure within the shoreland zone unless the performance standards in the section are met. Such a requirement unreasonably restricts the ability of property owners to improve their property.

R: Please refer to the response for Comment 100.

(3) Expansion of principal structures

C104: Agree with October proposal.

R: Please refer to the response for Comment 100.

C105: For water quality performance standard, what stormwater event is this for? 10, 20, 30 or more years?

R: Language clarified.

C106: The "visually inconspicuous" standard is problematic because it essentially prevents property owners from having a clear view of the water. People who purchase property near the water want to be able to see the water.
R: Language struck.

C107: Is it the intent of the DNR to require the natural scenic beauty standard throughout the entire shoreland area? This should only be for properties that front the lake or river.
R: All of the standards apply to the shoreland zone.

(4) Construction and replacement of principal structures
C108: Agree with October proposal.
R: Please refer to the response for Comment 100.

C109: The "visually inconspicuous" standard is problematic because it essentially prevents property owners from having a clear view of the water. People who purchase property near the water want to be able to see the water.
R: Language struck.

(5) Optional standards
C110: Agree with October proposal.
R: Please refer to the response for Comment 100.

NR 115.23 Adoption of administrative and enforcement provisions

C111: In sub. (3), NR 115 should not require a county permit to expire within any time period. The county should be able to determine the time period that a permit expires. Many projects are not totally completed (construction and filling or grading) within one year.
R: Language modified.

C112: In sub. (5), variances do not have a specific time period that they are valid for. An expiration date cannot be set for a variance regardless of construction commencing or not.
R: Language modified.

C113: In sub. (6), the department is trying to regulate the granting of variances by establishing restrictive purpose statements and then requiring the counties to adopt such purpose statements. If the department would like to change the standards for granting variances in shoreland areas, the department should seek statutory changes, rather than going through the "back door" of the rulemaking process.
R: To grant a variance, Boards must consider the purposes of the ordinance. If this chapter and ordinances do not contain purpose statements, it will be extremely difficult for Boards to determine if a variance will undermine the purpose of an ordinance provision.

C114: For sub. (7), the second sentence is a new legal requirement being imposed upon the ability of counties to grant conditional use permits and thus should be pursued through legislation, not administrative rule. This sentence should be omitted.
R: Language clarifies existing zoning practice and Wisconsin common law.

C115: For sub. (7), the department does not have the authority to determine the conditions under which a county may issue a conditional use permit. The legislature has this authority, not administrative agencies.

R: Please refer to the response for Comment 114.

C116: For sub. (11), the provision that makes "each day of continued violation a separate offense" and subject to a fine between $10 and $1000 per offense is entirely unreasonable. This provision should be omitted.

R: This provision allows counties to provide for larger forfeitures if it chooses to do so. The subsection says "including at a minimum forfeitures of not less than $10 and not more than $1,000 per violation." In individual enforcement cases, the county prosecutor has the discretion to determine what forfeiture or restoration to seek.

NR 115.25 Department duties

General Comments

C117: Sections of the draft are too detailed for an administrative rule.

R: Many provisions were shortened and simplified in latest draft.

C118: Lacks recognition of counties previous experience with comprehensive shoreland zoning revisions.

R: Recognition of revisions is included the purpose statement, and many provision have been modified to limit future amendments.

C119: Will have the potential to make numerous properties nonconforming.

R: Many of the existing standards are retained in proposed changes to limit creation of nonconforming properties.

C120: Does not provide for adequate time to review the draft prior to the January Natural Resources Board meeting.

R: The Department will likely be going to the Board in March for permission for public hearings.

C121: Does not address issues with urban lakes.

R: The recommendations of the urban lake workgroup are included in this draft. Other options have not been suggested.

C122: Possesses potential concerns with requirement of stormwater management plans as required in NR 216.

R: Language was struck.

C123: The draft is poorly organized.

R: Modifications have been made to clarify structure of code.

C124: Will expand workloads of the counties.

R: Modifications have been made to decrease workloads related to variances and in other areas as well.

C125: Contains numerous language contradictions.
R: Language has been modified to remove contradictions.

C126: The current draft has many provisions that will be extremely difficult for counties to enforce. Future drafts should only contain provisions that counties can enforce.
R: Language has been modified to eliminate provisions that may be difficult to enforce.